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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

ADAM WEISBLATT, JOE HANNA, and DAVID TURK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

APPLE INC., AT&T INC., AT&T MOBILITY LLC, and Does 1-10,

Defendants.

Case No. 5:10-cv-02553-RMW

CLASS ACTION

JOINT CASE MANAGEMENT STATEMENT

Date: October 15, 2010
Time: 10:30 a.m.
Courtroom 6, 4th Floor
Hon. Ronald M. Whyte

Pursuant to the Stipulation and Order Continuing Case Management Conference, filed August 27, 2010 (Doc. No. 39), and in accordance with Local Rule 16-9(a) and the Court's Standing Order Re Contents of Joint Case Management Statement, the parties hereby file their Joint Case Management Statement in advance of the Case Management Conference scheduled on October 15, 2010.

1. Jurisdiction and Service.

Subject matter jurisdiction is based on the Class Action Fairness Act, 28 U.S.C. § 1332(d). In addition, defendant Apple Inc.'s ("Apple") principal place of business is located in

this District and Division, and defendant AT&T Mobility LLC ("ATTM") also does business in this District and Division. All parties have been served. The parties stipulated to dismissal of AT&T Inc. without prejudice, and the Court entered its order dismissing AT&T Inc. without prejudice on September 16, 2010 (Doc. No. 41).

2. Facts.

(i) Plaintiffs' position.

Plaintiffs allege claims against Defendants Apple and ATTM in connection with the sale of 3G-enabled iPads. Specifically, Plaintiffs allege that Apple and ATTM intentionally made material, false representations to consumers regarding the availability of a flexible unlimited 3G data plan in order to bait consumers into purchasing 3G-enabled iPads, which cost approximately $130 more than iPads that are not 3G-enabled. Apple and AT&T promised consumers flexibility with their data plans, allowing them the ability to freely switch back and forth between the limited data plan, the unlimited data plan, and no 3G data plan, based on their budgets and data needs. The availability of a flexible unlimited data plan was material to purchasers' decisions because it allows customers to download video, music and other data-intensive content on their iPads without incurring excessive charges, and also allows them to not pay for unlimited data when they do not need it. Then, approximately a month after Apple began selling the 3G-enabled iPad, and after months of promoting the flexible unlimited data plan as a key benefit of the 3G-enabled iPad, ATTM discontinued the unlimited 3G data plan. The purchasers who initially opted for the limited data plan were stripped of their ability to later opt for the unlimited data plan, and even those customers who were signed up for the unlimited data plan can no longer switch to a limited data plan, then later opt for the unlimited plan again, as was originally promised. Apple and AT&T announced this policy change within just weeks after selling at least hundreds of thousands of 3G-enabled iPads upon the product's initial launch. Plaintiffs and the putative Class seek damages, restitution, and injunctive relief for Defendants' ubiquitous false representations, on their respective websites and elsewhere, that customers who purchase iPads with 3G capability would be able to freely switch in and out of an unlimited 3G data plan each month as their data needs demanded.

(ii) Defendants' position.

As set forth in section 4(A)(i) below, ATTM has moved to compel arbitration and to stay this action pending the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, No. 09-893. *See* Doc. No. 23. Apple has joined in the motion to stay.

Defendants do not believe it is appropriate to argue the merits of this case in this Statement but given plaintiffs' argumentative recitation, defendants are compelled to note that Apple's iPad 3G and ATTM's data service plans for iPad 3G have been well received by consumers. Contrary to plaintiffs' allegations, ATTM's "Unlimited" data plan was made available to all iPad owners who purchased their iPad 3Gs prior to the time ATTM announced the restructuring of its data plans. Defendants at all times truthfully represented all aspects of the iPad and data plans, and deny plaintiffs' allegations. Defendants further deny that plaintiffs were injured or damaged in any way or that they are entitled to any relief.

3. Legal Issues.

The operative First Amended Complaint ("FAC") (Docket No. 8) asserts the following seven causes of action: (i) intentional misrepresentation; (ii) false promise/fraud; (iii) negligent misrepresentation; (iv) violation of the California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq.; (v) violation of California Business & Professions Code §§ 17200 et seq.; (vi) violation of California Business & Professions Code §§ 17500 et seq.; and (vii) unjust enrichment. Defendants deny all liability allegedly arising from plaintiffs' claims. In addition, the parties dispute: (a) whether ATTM's arbitration provision is enforceable as to one or more of the Plaintiffs; and (b) whether Plaintiffs' claims are suitable for class treatment under Fed. Rule Civ. Pro. 23

4. Motions.

A. Pending Motions:

(i) Defendants' position.

On August 16, 2010, ATTM moved to compel arbitration of the plaintiffs' disputes with ATTM, or, in the alternative, to stay the case pending the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, No. 09-893. *See* Doc. No. 23. Each plaintiff has entered into

one or more agreements to arbitrate their disputes with ATTM on an individual rather than class-wide basis. Specifically, in *Concepcion*, the Supreme Court will decide whether the Federal Arbitration Act preempts California law and requires the enforcement of ATTM's arbitration agreement. The Supreme Court will hear oral argument in *Concepcion* on November 9. ATTM's motion to compel arbitration (or to stay proceedings pending *Concepcion*) is set for hearing before this Court on October 15, 2010. Apple filed its joinder in ATTM's motion to stay on August 17, 2010 (Doc. No. 35).

On October 4, 2010, Apple filed an Administrative Motion To Relate *Osetek v. Apple Inc.*, Case No. 5:10-cv-04253-JW, currently pending before Judge Ware (*see* Doc. No. 45).

(ii) Plaintiffs' position.

Plaintiffs' position is that ATTM's arbitration and class waiver provision is unconscionable and thus unenforceable, that the requested stay is not warranted, and that ATTM's pending motion should be denied in its entirety. *See* Docket No. 42 (Plaintiffs' Opposition Brief).

Plaintiffs do not oppose Apple's motion to relate the *Osetek* case to this action.

B. Anticipated Motions:

(i) Plaintiffs' position.

Plaintiffs anticipate that they will to move for class certification of their claims, pursuant to Fed. R. Civ. P. 23, at the appropriate time.

(ii) Defendants' position. Defendants' position is that ATTM's pending motion to compel arbitration may be dispositive of this case as to ATTM, or may result in the suspension of proceedings in this case. In the event that the proceedings are not suspended, Apple anticipates making a Federal Rule of Civil Procedure 42 motion to consolidate the *Weisblatt* action, *Logan v. Apple Inc.*, Case No. 4:10-cv-02588-RMW, and *Osetek v. Apple Inc.*, Case No. 5:10-cv-04253-JW.

5. Amendment of Pleadings.

(i) Plaintiffs' position.

Plaintiffs filed their operative First Amended Complaint on June 23, 2010 (Docket No.

8). Plaintiffs anticipate the possibility that after the Court's ruling on ATTM's motion to compel arbitration, a further amendment to the pleadings may be appropriate. Moreover, should this case be consolidated with the *Logan* and/or *Osetek* matters, an amended Master Complaint may be appropriate.

6. Evidence Preservation.

(i) Plaintiffs' position.

There is no reason to delay addressing evidence preservation, and Plaintiffs believe that the parties should commit to taking all necessary steps to preserve any and all written and electronic evidence that may be relevant to this case. Plaintiffs request that the Court order the parties to meet and confer about evidence preservation issues, and to submit any unresolved issues to the Court as necessary.

(ii) Defendants' position. For the reasons we discuss in paragraph 8 below, proceedings relating to discovery on the merits is improper while a motion to compel arbitration is pending. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address evidence preservation issues at this time.

7. Disclosures.

(i) Plaintiffs' position.

There is no reason to delay the exchange of initial disclosures at this time.

(ii) Defendants' position. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address initial disclosures at this time and that initial disclosures should be deferred until after the Court rules on the pending motion.

8. Discovery.

(i) Plaintiffs' position.

There is no reason to delay discovery at this time. Plaintiffs propose that discovery be

open for all purposes. Plaintiffs propose that the parties and Court discuss an appropriate discovery schedule and appropriate numerical limits for written discovery and depositions at the upcoming Case Management Conference.

(ii) Defendants' position. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address discovery at this time and that discovery should not proceed until after the Court rules on the pending motion. In accord with the strong federal policy favoring the enforcement of arbitration agreements, defendants are not required to litigate the merits of the plaintiffs' claims—including participating in discovery— while a motion to compel arbitration is pending. As the Supreme Court has held, "in passing upon a[n] application for a stay while the parties arbitrate, a federal court may consider ***only*** issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (emphasis added); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999). Requiring a defendant to respond to merits discovery in the face of a motion to compel arbitration would subject that defendant to the "very complexities, inconveniences[,] and expenses of litigation that the [parties] determined to avoid [by agreeing to arbitrate]." *Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649-50 (11th Cir. 1988) (Tjoflat, J., concurring). Instead, if this Court finds that this dispute is arbitrable, the arbitrator alone bears the authority and the responsibility to conduct discovery. For this reason, the Seventh Circuit has explained, permitting "discovery on the merits" before "the issue of [the] arbitrability [of the dispute] is resolved puts the cart before the horse." *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002).

Accordingly, courts routinely stay merits discovery when a motion to compel arbitration is pending before the court.[1]

[1] *See, e.g.*, *Stone v. Vail Resorts Dev. Co.*, 2010 WL 148278, at *4 (D. Colo. Jan. 7, 2010) (granting stay of all discovery during pendency of motion to compel arbitration); *PCH Mut. Ins. Co. v. Cas. & Sur., Inc.*, 569 F. Supp. 2d 67, 78 (D.D.C. 2008) (staying merits discovery pending resolution of motion to compel arbitration because "the Federal Arbitration Act requires that the (Continued…)

9. Class Actions.

(i) Plaintiffs' position.

Plaintiffs bring this action on behalf of the following Class:

> All persons in the United States who purchased or ordered an Apple iPad with 3G capability on or before June 6, 2010.
>
> Excluded from this Class is any person, firm, trust, corporation, or other entity related to or affiliated with Apple Inc., AT&T Inc., and AT&T Mobility LLC.

Plaintiffs contend that this action may properly be maintained as a class action pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3). Plaintiffs contend that this action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of these provisions:

(a) Numerosity: The members of the Class are so numerous that joinder of all members is impractical, if not impossible. Plaintiffs are informed and believe that the Class consists of at least hundreds of thousands of individuals. The Class is composed of an easily ascertainable, self-identifying set of individuals and entities who purchased 3G-enabled iPads from Defendants.

(b) Commonality: Common legal and factual questions exist that predominate over any questions affecting only individual Class members. These common questions, which do not vary from Class member to Class member, and which may be determined without reference to any Class member's individual circumstances, include, but are not limited to whether:

Court resolve the threshold issue of whether the parties agreed to mandatory arbitration before the litigation of this matter can continue"); *Cunningham v. Van Ru Credit Corp.*, 2006 WL 2056576, at *2 (E.D. Mich. July 21, 2006) (staying merits discovery pending resolution of motion to compel arbitration); *Ross v. Bank of Am., N.A.*, 2006 WL 36909, at *1 (S.D.N.Y. Jan. 6, 2006) (same); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Coors*, 357 F. Supp. 2d 1277, 1281 (D. Colo. 2004) (issuing stay of "all discovery and pretrial scheduling" pending resolution of motion to compel arbitration); *Intertec Contracting A/S v. Turner Steiner Int'l, S.A.*, 2001 WL 812224, at *7 (S.D.N.Y. July 18, 2001) ("As is the general practice of district courts, a stay of discovery was imposed in this case while the motion to compel arbitration was pending before the Court."); *Cole v. Halliburton Co.*, 2000 WL 1531614, at *2 (W.D. Okla. Sept. 6, 2000) (refusing to permit discovery during pendency of motion to compel arbitration).

i. The offer of an unlimited data plan and/or the ability to switch in and out of an unlimited data plan are material facts that reasonable purchasers would have considered important in making their purchase decisions;

ii. Defendants engaged in unfair, false, misleading, or deceptive acts or practices regarding its marketing and sale of 3G-capable iPads, in violation of the UCL;

iii Defendants represented, through their words and conduct, that their iPads with 3G capability had characteristics, uses, or benefits they did not actually have, in violation of the CLRA;

iv. Defendants advertised the 3G-capable iPads with the intent not to sell them as advertised, in violation of the CLRA;

v. Defendants' conduct regarding the marketing and sale of its 3G iPads was likely to mislead or deceive, and is therefore fraudulent, within the meaning of the UCL;

vi. Defendants' conduct alleged herein constitutes false advertising in violation of Cal. Bus. & Prof. Code §§ 17500, et seq.;

vii. Defendants' conduct alleged herein constitutes fraud and/or intentional misrepresentation;

vii. Defendants' conduct alleged herein constitutes negligent misrepresentation;

ix. Defendants have been unjustly enriched by their conduct alleged herein;

x. Plaintiffs and the Class are entitled to injunctive and/or other equitable relief, including restitution and disgorgement, and if so, the nature and amount of such relief;

xi. Defendants are liable for actual and/or compensatory damages, and, if so, the amount of such damages; and

xii. Defendants are liable for punitive damages, and if so, the amount of such damages.

(c) Typicality: Plaintiffs' claims are typical of the Class members' claims. Defendants' common course of conduct caused Plaintiffs and all Class members the same damages. In particular, Defendants' conduct caused each Class member's economic losses. Likewise, Plaintiffs and other Class members must prove the same facts in order to establish the same claims.

(d) Adequacy: Plaintiffs are adequate Class representatives because they are Class members and their interests do not conflict with Class interests. Plaintiffs retained counsel competent and experienced in consumer protection class actions, and together Plaintiffs and counsel intend to prosecute this action vigorously for the Class's benefit. Plaintiffs and their counsel will fairly and adequately protect Class interests.

Moreover, the Class can be properly maintained under Rule 23(b)(2). Defendants have acted or refused to act, with respect to some or all issues presented in this action, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

Moreover, the Class can be properly maintained under Rule 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of this litigation because individual litigation of each Class member's claim is impracticable. Even if each Class member could afford individual litigation, the court system could not. It would be unduly burdensome if thousands of individual cases proceed. Likewise, individual litigation presents a potential for inconsistent or contradictory judgments, the prospect of a race for the courthouse, as well as the risk of an inequitable allocation of recovery among those with equally meritorious claims. Individual litigation further increases the expense and delay to all parties and the courts because it requires individual resolution of common legal and factual questions. By contrast, the class action device presents far fewer management difficulties and provides the benefit of a single adjudication, economies of scale, and comprehensive supervision by a single court.

Plaintiffs propose that the parties and the Court, in connection with setting an appropriate discovery schedule, discuss an appropriate schedule for Plaintiffs' anticipated class certification motion at the upcoming Case Management Conference.

(ii) Defendants' position. Defendants dispute plaintiffs' contentions that the action is properly maintainable as a class action. Furthermore, all of the named plaintiffs—and all putative class members—have agreed that they will resolve their disputes with ATTM by arbitration on an individual rather than class-wide basis, and accordingly that they will not bring or participate in a class-action lawsuit. In light of ATTM's pending motion to compel

arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address class issues at this time or to determine a schedule for a class certification motion.

10. Related Cases.

Pursuant to the Court's September 14, 2010 Related Case Order (Doc. No. 40), *Logan v. Apple Inc.*, Case No. 4:10-cv-02588-RMW, previously pending before Judge Wilken, was determined to be related to this action and was reassigned to this Court. On October 4, 2010, Apple filed an Administrative Motion To Relate *Osetek v. Apple Inc.*, Case No. 5:10-cv-04253-JW, currently pending before Judge Ware (Doc. No. 45).

11. Relief.

(i) Plaintiffs' position.

Plaintiffs, on behalf of themselves and the Class, seek: (a) permanent injunctive relief enjoining Defendants from engaging in the false advertising and other improper activities alleged in this case; (b) compensatory damages according to proof; (c) restitution according to proof; (d) punitive damages according to proof; (e) pre- and post-judgment interest; and (f) reasonable attorneys' fees and expenses.

(ii) Defendants' position. Defendants disagree that plaintiffs are entitled to any relief and thus no calculation of estimated damages is appropriate. Defendants further dispute that damages can be calculated or ascertained on a classwide basis. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address relief issues at this time.

12. Settlement and ADR.

(i) Plaintiffs' position.

Plaintiffs believe it is appropriate at this stage for the parties to chose an appropriate ADR option pursuant to ADR Local Rule 3, and have attempted to meet and confer with Defendants about this issue.

(ii) Defendants' position. Defendants believe that any discussion of settlement is

premature at this time. Defendants are not aware of any attempt by plaintiffs to meet and confer with them regarding ADR. ATTM's position is that the named plaintiffs should pursue their disputes with ATTM by arbitration on an individual basis in accordance with their arbitration agreements,

13. Consent to Magistrate Judge for All Purposes.

(i) Plaintiffs' position. Defendants have declined to consent to a magistrate judge for all purposes.

(ii) Defendants' position. Defendants decline to consent to a magistrate judge for all purposes.

14. Other References.

(ii) Defendants' position. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address other references at this time.

15. Narrowing of Issues.

(i) Plaintiffs' position.

The parties were unable to narrow the issues concerning the enforceability of ATTM's arbitration and class waiver provision. Plaintiffs believe it is premature at this time to discuss any further narrowing of the issues.

(ii) Defendants' position. ATTM believes that its pending motion will substantially narrow the issues by dismissing ATTM from the action.

16. Expedited Schedule.

(i) Plaintiffs' position.

Plaintiffs believe it is premature to discuss any expedited scheduling at this time.

(ii) Defendants' position. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address scheduling issues at this time.

17. Scheduling.

(i) Plaintiffs' position.

Plaintiffs propose that the parties and the Court discuss an appropriate discovery schedule and schedule for Plaintiffs' anticipated motion for class certification at the upcoming Case Management Conference.

(ii) Defendants' position. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address scheduling issues at this time.

18. Trial.

(i) Plaintiffs' position.

Plaintiffs believe that it is premature to discuss the date and length of trial at this time.

(ii) Defendants' position. In light of ATTM's pending motion to compel arbitration, which potentially will be dispositive of this case as to ATTM, or which may result in the suspension of proceedings in this case, defendants' position is that it is premature to address trial-related issues at this time.

19. Disclosure of Non-Party Interested Entities or Persons.

Defendant Apple filed its Certification of Interested Entities or Parties on June 29, 2010, stating that Apple has no parent corporation and that, according to Apple's Proxy Statement filed with the Securities and Exchange Commission in January 2010, there are no beneficial owners who own more than 10% of Apple's outstanding common stock.

Defendant ATTM filed its Certification of Interested Entities or Persons on August 16, 2010, identifying (in addition to counsel for the parties) the following: Adam Weisblatt, Joe Hanna and David Turk (plaintiffs); AT&T Mobility LLC, Apple Inc. and AT&T Inc. (defendants); AT&T Mobility Corporation (owner of AT&T Mobility LLC (not publicly traded)); SBC Long Distance LLC (sole member SBC Telecom, Inc., owner of AT&T Mobility LLC (not publicly traded)); SBC Alloy Holdings, Inc. (owner of AT&T Mobility LLC (not publicly traded)); New BellSouth Cingular Holdings, Inc. (owner of AT&T Mobility LLC (not publicly

traded)); and BellSouth Mobile Data, Inc. (owner of AT&T Mobility LLC (not publicly traded)).

20. Other Matters.

None at this time.

Dated: October 6, 2010

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